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IN THE SUPREME COURT OF
THE UNITED STATES
TERM 1982

MARY C. SMITH, CAROL R. DIMAIO,
and HOWARD E. WATTS, JR.,

Howard E. Watts, Jr., Petitioner,

vs.

JOSEPH HORNE COMPANY, INC.,
a Pennsylvania corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT OF RESPONDENT JOSEPH HORNE COMPANY

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I. COUNTERSTATEMENT OF THE ISSUES

1. Should this Court review a factual determination which was made by the District Court and affirmed by the Court of Appeals?
2. Should this Court review a case in which the legal standard applied by the courts below is fully consonant with that recently enunciated by this Court in Texas Department of Community Affairs v. Burdine?
3. Should this Court consider a question which raises, at most, an intracircuit conflict?

II. COUNTERSTATEMENT OF FACTS

Petitioner's Statement of the Case at paragraphs 1, 2 and 5 (Petition at 4-6, 13-14) relating to the legal basis of the suit, the judgment entered by the District Court, and the decision of the Court of Appeals is essentially correct. The following is a counterstatement of the underlying facts of the case relevant to the Petition.

Respondent Hornes operates a number of retail department stores in the Western Pennsylvania area. Petitioner Watts was hired by Hornes to work in the Wig and Millinery Department (the "Wig Department") of the downtown Pittsburgh store ("Downtown Store") on March 24, 1970 (Finding of Fact No. 12; Petition at C-4). Hornes' wig sales were very good during that year, showing a "dramatic" increase over the previous year of 1969. (A-840). However, in each succeeding year, Hornes' wig sales declined steadily.

Net sales in the Wig Department at all Hornes' stores decreased from $376,771 in 1970 to $237,458 in 1971 to $198,699 in 1972 representing a 37% drop in 1971 and a 16.3% drop in 1972. (Finding of Fact No. 27; Petition at C-12). Wig sales in the Downtown Store mirrored this company-wide trend; dollar volume dropped 30.9% in 1971 and 19.4% in 1972. (Finding of Fact No. 27; Petition at C-15). Wig sale at Hornes continued to decline throughout 1973, 1974 and 1975. (Finding of Fact No. 33; Petition at C-15).

In the same period, the "selling costs" for wigs, that is, the wages of salespeople in the Department divided by the volume of sales, increased dramatically. (A-659, A-841). In 1970, the selling costs for the Wig Department at all Hornes' stores were relatively high, 11% of gross sales compared to the overall norm of about 8%. (A-840-841, A-1215). Selling costs in 1971 climbed to 18.1% of sales and

in 1972 increased again to 19.6% of sales. (A-840-841, A-1217, A-1219).

In response to the trend of declining sales and increasing costs in the Wig Department, Hornes' management personnel began to discuss the possibility of making layoffs in January, 1972. (A-984-985). In May, 1972, Hornes' management personnel met to develop budgets for the fall season and, again, the advisability of making layoff in the Wig Department was discussed. (A-986-990). In late May, 1972, a final decision to make layoffs in the Wig Department in the Downtown Store was made at a meeting which included Lawrence Stoneberg, Hornes' Vice President and General Superintendent, based on a projected continuing decline in sales. (A-844-846).

On June 6, 1972, Russell Klapach, the Business Agent for Local 1407 of the Retail Store Employees Union ("Local 1407"), telephoned Robert Neal, Hornes' Manager of Labor

Relations, and advised him of the complaints of Plaintiffs Smith and DiMaio with respect to the discrepancy between the wages they were being paid and that of Watts. (A-485-486). Klapach followed the telephone call with a letter dated June 14, 1972 to Neal. (A-486-487). Klapach testified that at a lunch meeting with Neal on June 26, 1972, Neal remarked to him,"...if Mr. Watts were laid off, we wouldn't have a problem". (A-488).

Following the June 6, 1972 telephone call from Klapach, Neal contacted Stoneberg and informed him of the complaint which Klapach had discussed. Stoneberg told Neal that Neal and he should discuss the complaint in greater detail. Stoneberg also told Neal to inform Klapach that layoffs were pending in the Department and instructed Neal to determine who would be affected by the layoffs. (A-846-847). Neal then told Klapach that layoffs were

imminent due to declining sales. (A-526-527).

The determination of who would be laid off was made at a meeting in late June, 1972 when the seniority list for the Wig Department was reviewed. (A-657). The terms of the collective bargaining agreement between Hornes and Local 1407 required that "extra" employees (those not employed on a full-time, 40 hour per week basis) in a department be laid off first and then that layoffs be made in reverse order of seniority - the least senior being laid off first. (Finding of Fact No. 35; Petition at C-14). Dorys Klein was then the only "extra" in the Wig Department and she was laid off effective July 6, 1972. (Finding of Fact No. 33; Petition at C-14). Howard Watts was the least senior regular employee in the Department and was laid off effective July 8, 1972. (Findings of Fact Nos. 36, 37; Petition at C-14, C-15).

The decline in wig sales continued at Hornes through 1973, 1974 and 1975. (Finding of Fact No. 38; Petition at C-15). As a result of the continued decline, additional layoffs were made in the Wig Department. In June of 1972, ten to twelve persons were employed in the Wig Department at the Downtown Store. (A-280). By June of 1973, that number had been reduced to five or six and during the period of January, 1976 to November, 1979, there were only four employees remaining in the Wig Department at the Downtown Store. (A-280-281). At the time of trial the number had been reduced to three. (A-961). No new employees were hired in the Department subsequent to Watts' layoff. (A-653, A-961).

III. ARGUMENT

A. THE FACTUAL FINDINGS OF THE DISTRICT COURT ARE NOT PROPERLY REVIEWABLE BY THIS COURT.

Petitioner presents two questions for review by this Court. Each of them raises the issue of whether the District Court's factual findings were correct. Thus, the outcome of this case will be changed only if, after a thorough review of the evidence adduced at trial, this Court makes wholesale revisions of the District Court's factual findings.

That the questions presented in this case are based entirely on issues of fact makes this case inappropriate for review by this Court. This Court does not undertake to review the evidence or discuss the facts of a particular case. United States v. Johnson, 268 U.S. 220 (1929). In addition, even if this Court were to undertake such a factual review and, further, if it were to reject the District Court's findings in favor of

its own, the resulting opinion would be so tied to the complex facts of this case that it would be of virtually no precedential value.

The questions raised by Petitioner are two facets of the same issue: whether Petitioner produced sufficient evidence at trial to meet his ultimate burden of proving discrimination. Petitioner outlines certain circumstantial evidence in his argument. The District Court considered this evidence and found it sufficient to make out Petitioner's prima facie case. However, the District Court also considered the economic evidence adduced by Hornes, which was not disputed by Petitioner. The District Court summarized its factual findings[1] on the relevant points as follows:

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[1]This Court has recently affirmed the proposition that a court's findings related to whether discrimination exists are findings of fact and thus subject to review only under the "clearly erroneous" standard of Rule 52

> Plaintiff Watts made out a prima facie case of a retaliatory firing and discrimination on the basis of sex by presenting evidence that shortly before he was laid off, the Defendant Hornes threatened to lay him off because Plaintiffs Smith and DiMaio filed charges with the EEOC alleging they were not paid equally with him.
>
> However, Plaintiff Watts did not carry his burden of persuasion in the face of evidence presented by the Defendant Hornes of greatly declining wig sales and contractual obligations to reduce the work force in order of seniority.

(Conclusions of Law Nos. 4, 5; Petition at C-19).

The District Court differed with Petitioner, not in the evidence it

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1 cont.
of the Federal Rules of Civil Procedure. Pullman-Standard v. Swint, et al., __ U.S. __, 72 L.Ed. 2d 66 (1982). The Court of Appeals properly refused to find the District Court's factual findings to be clearly erroneous.

considered, but rather in the credibility and weight it gave to that evidence. The District Court compared the probative value of the essentially circumstantial evidence adduced by Petitioner with the probative value of the undisputed economic facts proved by Respondent and found that Petitioner had not met his burden of proof.

The District Court determined that Petitioner was laid off because wig sales had plummeted and because at the time of his layoff he was the least senior employee in his department. (Findings of Fact Nos. 27, 36, 37; Petition at C-12, C-14-15). That the decline in sales was not a pretext for the layoff of Watts is further proved by the fact that, as sales continued to decline after Petitioner was laid off, additional employees were laid off, again in reverse order of seniority as required by the union contract. (Findings of Fact Nos. 38, 39, 40; Petition 4-15). Petitioner

does not dispute these facts. (Petition at 11-12). His sole argument is that the circumstantial evidence which the District Court found sufficient to establish Petitioner's prima facie case was also sufficient to meet his ultimate burden of proof.

Both the District Court and the Court of Appeals have considered Petitioner's argument on this point and rejected it. The District Court not only heard the evidence and observed the witnesses at trial, but also specifically considered Petitioner's argument that a discriminatory motive was a "determinative factor" in the layoff by ruling on Petitioner's Motion to Make Supplemental Findings of Fact and Conclusions of Law. (Petition at 13-14). The District Court denied that motion. (Petition at D-2). Petitioner raised the identical point on appeal, but the judgment of the District Court was affirmed (Petition at A-3) and

Petitioner's Motion for Rehearing was denied. (Petition at B-1).

This Court does not sit to correct facts found by the trial court which were confirmed by the court of appeals in the absence of an exceptional show of error. Berenyi v. United States, 385 U.S. 630, 635 (1968). Petitioner has not shown such error. The plain fact of the matter is that Petitioner was laid off because of the unfortunate realities of the marketplace. This case, which is based on the unchallenged economic facts outlined above, is not appropriate for review by this Court.

B. PETITIONER HERE ASKS THAT THIS COURT REJECT THE BURDEN OF PROOF STANDARD WHICH IT RECENTLY ADOPTED IN BURDINE.

In the context of arguing that he had met his burden of proof before the District Court, Petitioner also argues for his construction of a rule of law which pre-dates the recent

decision of this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Burdine confirmed the concise three-step analysis of cases brought under Title VII established by this Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). That analysis is as follows:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."...Third, should the defendant carry his burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. (citation omitted). (emphasis added).

Burdine at 250.

The Burdine court went on to define the standard for the ultimate burden which a plaintiff must meet by explaining that,

> [the plaintiff] may succeed ...either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. (citation omitted). (emphasis added).

Ibid.at 254. Burdine focuses on exactly what the plaintiff must prove in order to overcome the defendant's having articulated a legitimate, non-discriminatory reason. In doing so, this Court clarified an issue which lower courts had confused.[2]

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[2]A good example of this confusion is the argument in the Petition. Petitioner phrases the questions presented in terms of whether the discriminatory motive was a "substantial factor" in the layoff. (Petition at ii). Petitioner then argues in his Petition for the application of a standard which is met if plaintiff proves the dis-

Although the District Court decision here pre-dated Burdine, it is apparent from its factual findings that the legal standard it applied was in full accord with Burdine.[3]

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2 cont.
criminatory motive to be "a determinative factor", as discussed below. Petitioner then goes on to state a variety of other standards, some of his own and some which had been articulated by other courts, which include: "made a difference", (Petition at 17-18); "played a part", (Petition at 19); and "at least, in part, a factor", (Petition at 21). The application of any of these standards would alter the burden of proof entirely because, once the plaintiff proved his prima facie case, the defendant would have to prove, for example, that the discriminatory motive was not a factor. Burdine put an end to this confusion.

[3]The District Court's summary of its findings on the relevant issue are quoted in full at page 10, above.

Phrased in the terms of Burdine, the District Court found that Petitioner had proved his prima facie case; that Respondent had articulated a legitimate, non-discriminatory reason for its action; and that Petitioner had failed his ultimate burden of proving that the justification articulated by Respondent was a mere pretext.

Petitioner has not argued that the courts below applied a legal standard to this case which is not consistent with Burdine. Rather, Petitioner asks this Court to adopt his construction of the language of the pre-Burdine decision of the Third Circuit in Smithers v. Bailar, 629 F.2d 892 (3rd Cir. 1980), to the effect that the ultimate burden on the plaintiff is satisfied if he proves that an improper motive was a "determinative factor" in Respondent's decision to lay off Petitioner. He then argues that the circumstantial evidence which he adduced was sufficient to establish that a dis-

criminatory motive was a "determinative factor".[4] (Petition at 17).

In his Petition, Petitioner fails to discuss what changes the adoption of Smithers would bring to the analysis of Burdine. If adopting Smithers as argued by Petitioner would not alter Burdine, then there is no reason for this Court to review this case, for the decisions of the Courts below

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[4]As discussed at footnote 3, supra., Petitioner has argued for the application of any number of legal standards. However, inasmuch as the District Court found that Petitioner's evidence was insufficient beyond proving a mere prima facie case, Petitioner may prevail here only if this Court adopts a standard whereby a plaintiff may meet his ultimate burden of proof merely by establishing a prima facie case so long as the defendant does not prove that a discriminatory motive was not a factor. This is the antithesis of the Burdine rule.

follow the rule of Burdine. If, however, Petitioner would have this Court revise Burdine, he must justify the reasons for doing so. This he does not do. In fact, Petitioner does not analyze or even cite to Burdine in the Petition.[5]

Petitioner argues that his construction of Smithers is the rule and that the Court of Appeals simply

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[5]Petitioner seemingly implies that the Smithers rule is only applicable to those Title VII cases involving mixed motives by describing Smithers as a rule to be applied here"...where there is an issue of mixed motives in proving a discriminatory discharge". (Petition at 14-15). Thus, Petitioner argues by implication that Smithers does not conflict with Burdine because it only amplifies the rule as it is to be applied in what it is suggested are the limited number of Title VII cases involving "mixed motives". However, there is at least some question of "mixed motives" in virtually every case in which the plaintiff establishes his prima facie case and the defendant articulates a legitimate non-discriminatory justification. Thus, the "limited number" of cases would, in fact, include every case

failed to apply it. That is not the case. Burdine is the rule and Petitioner can properly seek review by this Court only if either the Court of Appeals misapplied Burdine or if there are positive, compelling reasons to revise Burdine.[6] Petitioner has not attempted to make either argument; he has simply ignored Burdine.

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5 cont.
in which plaintiff is required to meet his full burden of proof. Petitioner has recognized this fact, but not the anomaly it creates in his argument. (Petition at 16-17). Burdine covers the situation of "mixed motives" precisely by requiring that the plaintiff prove "...that a discriminatory reason more likely motivated the employer..." (emphasis added). Burdine at 254. See also footnote 3, supra.

[6]Burdine was decided in 1981 and thus is not a case ripe for reexamination. See Marchetti v. United States, 390 U.S. 39 (1968). Further, Burdine enunciated a clear and simple rule which has not been the cause of confusion or the subject of scholarly or judicial controversy. See, Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1978).

Because the courts below applied a legal standard in full accord with the prevailing decision of this Court and because Petitioner has not presented any reason that the decision should be reconsidered, it would be inappropriate for this Court to review the case presented.

C. PETITIONER HAS RAISED NO QUESTION ABOUT WHICH THE CIRCUITS ARE IN CONFLICT.

Petitioner, in part, bases his argument for review by this Court on a purported failure by the Court of Appeals to follow its own decision in Smithers, supra. Petitioner argues that "...in view of...the failure of the Court of Appeals to follow its own decisions, review of the decision below is essential". (Petition at 23). However, even if Petitioner had established a conflict between decisions within the Third Circuit, such intracircuit conflicts are not properly resolved by this Court. Davis v. United States, 471 U.S. 333, 340 (1974).

IV. CONCLUSION

For the reasons set forth, Joseph Horne Company respectfully requests that this Court deny Howard Watts' Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit of Respondent Joseph Horne Company were served this 8th day of December, 1982, on counsel for all parties of record by depositing the same in the United States Mail, First Class, postage prepaid, as follows:

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